MINISTER OF WATER AFFAIRS v MEYBURG 1966 (4) SA 51 (E)

Citation	1966 (4) SA 51 (E)
Court	Eastern Cape Division
Judge	Cloete J
Heard	July 5, 1966
Judgment	July 5, 1966
Annotations	

Flynote : Sleutelwoorde

Costs - Taxation of - Party and party - Charge for perusing heads of argument used as aids to argument - Disallowance of - Fees for attendance of more than one attorney - Special circumstances - Disallowance of - 'Payment of a special fee to an advocate' - What constitutes - Precluding of under Rule of Court 70 (3).

Headnote : Kopnota

In a party and party bill of costs no charge can be claimed for perusing 'heads of argument' prepared by counsel as an aid to argument, and delivered by him to his opponent through the latter's instructing attorneys.
Where there are unusual circumstances on the strength of which a claim for fees for attendance of more than one attorney has been made in a bill of costs, but the taxing master has, after weighing those circumstances in relation to the general principle that the existence of very strong reasons is a prerequisite to the allowance of fees for the attendance of an attorney not practising at the seat of the Court, rejected the claim, the Court on review cannot interfere with his exercise of his discretion in a proper manner and in a manner not justifying alteration on review.
Rule of Court 70 (3) precludes the allowance in a party and party bill of costs incurred by 'payment of a special fee to an advocate', such as one made on the ground that he was required to appear in a Provincial Division other than the one in which he normally practises.

Case Information

Review of taxation under Rule of Court 48.

Judgment

CLOETE, J.: The applicant was the respondent in an interlocutory application brought by the respondent on 27th January, 1966, for an order compelling the applicant to furnish further and better particulars asked for in requests therefor dated 2nd November, 1965, and 21st December, 1965. These interlocutory proceedings related to an application in terms of sec. 60 of the Water Act, 54 of 1956, as amended, in which the present respondent (as applicant) sought an order determining the amount of compensation payable to him for certain farm land

expropriated by the present applicant (as respondent). On 28th January, 1966, the Court dismissed the interlocutory application with costs.
The taxing master, in the exercise of his discretion, when the respondent's bill of costs was taxed, disallowed certain items which may be summarised as follows, namely:

(a) perusing the applicant's (now respondent's) heads of argument by the respondent;

(b) respondent's (now applicant's) attorney's appearance in Court at Grahamstown, and his ancillary claims related thereto; and

(c) a special fee for counsel.

These items are more specifically described in the bill, as follows:

"(1)	Deurlesing van applikant se hoofde van argument (100 fols).	R27.50
(2)	Bywoning van Hof toe aansoek beredeneer is (7 uur)	R36.75
(3)	Bywoning van Hof toe aansoek verwerp is (3 uur)	R15.75
(4)	Spesiale toelaag (tarief) item E (1) t.o.v. reis en wagtyd bestee vir doeleindes van saak (2 dae)	R42.00
(5)	Bedrag opgeëis t.o.v. noodsaaklike vervoerkoste (reis Grahamstown toe en terug Bethulie) (500 myl)	R50.00
(6)	Spesiale fooi (verskyning buite Provinsie)	R30.00"

The grounds relied upon by the taxing master were that they were not necessary or proper for the attainment of justice as between party and party.
The question now to be determined is whether the taxing master, in the exercise of his discretion, has erred in disallowing the fees and disbursements mentioned in a party and party bill of costs.
It is a well-established principle that the Court will not lightly disturb the ruling of a taxing master where he has exercised his discretion. It will be interfered with if *(a)* he has not exercised his discretion judicially, that is, if he has exercised it improperly; *(b)* he has not brought his mind to bear upon the question; or *(c)* he has acted on a wrong principle. See e.g. *Nourse Mines, Ltd v Clarke*, 1910 T.P.D. 660; *Koch v S.K.F. Laboratories (Pty.) Ltd.*, 1962 (3) SA 764 (E) . In *Century Trading Co. (Pty.) Ltd v The Taxing Master and Another*, 1958 (1) SA 78 (W) , it was held that a review of this nature is a revision of the taxation and that the Court will interfere not only when it considers that the taxing master has exercised his discretion improperly on some question of principle, but also when it considers that the taxing master has been clearly wrong in regard to some item in the bill of costs.
If one has regard to these principles then it seems to me that there are no grounds for interfering with the taxing master's decision in regard to the disallowance of the fees claimed for perusing the present respondent's so-called heads of argument. These are not required by the Rules and it is clear that, in accordance with a salutary practice which is common in this Court and which is to be encouraged, the present respondent's counsel, as a matter of courtesy to his opponent, handed a copy of his heads of argument to his instructing attorney, to be sent to his opponent through his instructing attorneys. The applicant's local attorneys were given these so-called heads of argument for delivery to the applicant's counsel. What often happens in practice is that counsel as between themselves exchange such documents without reference to their

attorneys. In this instance counsel were not local counsel and for that reason it was obviously convenient to effect the exchange through the medium of the attorneys. I have referred to them as 'so-called heads of argument' because they do not in fact constitute anything more than aids to argument as that term is used in *Duvos (Pty.) Ltd v Newcastle Town Council and Others*,

1965 (4) SA 553 (N) at p. 559. The document in this case was prepared by counsel for the convenience of himself and the Court and as a matter of courtesy was delivered to his opponent through the latter's instructing attorneys. It does not as such constitute a party and party charge and in my view the taxing master was correct in disallowing it in the taxation.

I shall deal next with items 2, 3, 4 and 5 mentioned above, all of which relate to charges made by the present applicant's attorney for travelling to Grahamstown and attending the hearing of the interlocutory application.

It has been submitted on behalf of the present applicant that the interlocutory application presented certain unique and special features which justify the inclusion of the items objected to in a party and party bill of costs. Thus it is contended that a material factor is that the main case was not being handled by local counsel and that, in view of the scope and magnitude of the main case, it was essential in order to save costs to handle it on behalf of the Minister of Water Affairs from Pretoria.

It cannot be disputed that, in so far as the main case is concerned, a considerable saving of costs has probably resulted in relation to consultations with counsel, the State Attorney, departmental officials and the technical officers of the Departments of Lands, Water Affairs and Agriculture - the majority of whom are in Pretoria. It is clear, too, that, because the very many records of the various Government Departments which have a bearing on the main case are in the departmental files in Pretoria, considerations of economy and expediency required that the case should be handled from Pretoria. It is obvious that the alternative of briefing local counsel through local correspondents would have resulted in much extra correspondence and travelling in the handling of the case. The submission is then that, because the interlocutory application was launched by the present respondent barely five weeks before the hearing of the main case of such considerable complexity, magnitude and scope and in fact untimeously in relation to both Water Court reg. 17 (2) and Supreme Court Rule 6 (13), it was prejudicial to the present applicant in its conduct of the case. This required urgent handling of the matter particularly since a granting of the application would have required immediate decision and action on behalf of the present applicant, including a decision as to the possibility of postponement of the main case. It is submitted that it would have been impracticable to have expected the local correspondents of the State Attorney to have dealt with such matters and that it was not only preferable but indeed necessary for the State Attorney or his representative to be present at the hearing of the interlocutory application and that this justified the invocation of the proviso to tariff item *(e)* (i) (*b).*

This argument in effect is that, because the interlocutory application

was so inextricably bound up with the complex main case, it justified the attendance at Grahamstown of the State Attorney or his representative who was *au fait* with all the issues, and that this justifies the allowance of the additional costs as between party and party. Reference to the interlocutory application shows that it consisted of an affidavit of 6 folios and a notice of application. No opposing affidavit was filed. At the hearing the Court was bound by the documents comprising the application and the pleadings and other process filed of record in the main case.

The present respondent has submitted that, in view of these facts, the attendance of the State Attorney or his representative at Court could not have assisted.

The taxing master in disallowing the disputed items has conceded that there were unusual features but, in the exercise of his discretion, he has nevertheless refused to allow them in a party and party bill of costs. In doing so he has relied upon certain passages in the well-known book *Taxation of Bills of Costs* by Roos which has been accepted as a recognised text-book for taxing masters and practitioners since 1947. (See *S.A.R. & H v Illovo Sugar Estates Ltd. and*

Another, 1954 (4) SA 425 (N) at p. 429, *per* BROOME, J.P.).
The author says at p. 16 of the book:

> 'Very rarely will it be necessary to allow the attendance of more than one attorney in Court even as between attorney and client. Very strong reasons will have to be given before it can be allowed. At times it is preferable to allow the attendance of the country attorney instead of the town attorney, as he might have special and intimate knowledge of the facts and the local conditions in connection with the action, but in such cases the attendance of the town attorney is invariably disallowed . . . If the country attorney is allowed to attend Court, etc., then the costs of the attorney of record are, as a rule, very considerably reduced, and the attorney of record can then charge for little more than the mere filing of records and documents and the writing and perusal of necessary letters. He cannot charge for instructions, and may be allowed a formal perusal of documents, such as pleadings, etc. The country attorney may in such a case be allowed his travelling expenses.'

It is clear, therefore, that the taxing master appreciated that in the present case there were the unusual features outlined above. It is clear too that he weighed these in relation to the general principle that the existence of very strong reasons is a prerequisite for the allowance of fees for the attendance of an attorney not practising at the seat of the Court. It is clear lastly that in the exercise of his discretion he has disallowed the disputed items as not being justified by the existing unusual circumstances. In these circumstances it seems to me that there are no grounds upon which it can now be said that he has exercised his discretion improperly or in a manner which justifies alteration on review.
Finally there is the question of the payment of a special fee to counsel. The applicant's submissions are that the General Council of the Bar of South Africa approved of a special fee being payable to counsel when he appears in a Provincial Division other than the one in which he normally practises, that it was necessary in this case to employ counsel practising in Pretoria and that, on the basis of the decision in *Thumler v Weis*, 1934 E.D.L. 224, the Courts have approved in principle of the payment of such a fee.
It seems to me that Rule of Court 70 (3) is decisive of the matter. The relevant portion of the Rule appears to be clear. It reads as follows:

CLOETE J

> ' . . . but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons, or by other unusual expenses'.

The ordinary clear meaning of the words which I have underlined in the context of this Rule is that costs incurred by payment of a special fee to an advocate must be disallowed by the taxing master in a party and party bill of costs. To that extent the taxing master appears to have no discretion at all. The case of *Thumler v Weis, supra*, which reviewed the prevailing practices in the then existing Division of the Supreme Court in the four Provinces, dealt with the principle of allowing an enhanced fee for counsel's appearance at a Circuit Court as distinct from the usual fee charged at the seat of the Court where counsel resided and kept chambers. It seems to me that the case is clearly distinguishable from the present one and cannot be invoked as authority for allowing the payment of the special fee claimed in this case. The cases are not parallel, but in any event the Rule as now framed seems to me clearly to preclude the payment of the special fee for counsel claimed in this case.
In the result therefore the applicant is unsuccessful in all his contentions and the application must fail. It is dismissed and the applicant is ordered to pay the sum of R15 as costs.
Applicant's Attorneys: *Whiteside, Smit & Rogers*. Respondent's Attorneys: *Dold & Stone.*